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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARSHALL JOSEPH MORENO, Defendant and Appellant.	E047841 (Super.Ct.No. SWF026663) OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Marshall Moreno, of inflicting corporal injury on a cohabitant, having suffered a prior conviction of the same (Pen. Code, § 273.5, subd. (e)(1),[1] and dissuasion of a witness (§ 136.1, subd. (c)(1)). The jury further found that defendant had suffered a strike prior. He was sentenced to prison for 14 years and appeals, claiming his *Marsden*[2] motion and his *Romero*[3] motion were erroneously denied. We reject his contentions and affirm.

FACTS

On September 14, 2008, defendant grabbed the arm of his sickly live-in girlfriend (the victim) and threatened to kill her before the police arrived. When she went downstairs to call the police from the apartment manager's apartment, he threatened to break down the manager's door. More facts will be discussed in connection with the issues.

ISSUES AND DISCUSSION

1. *Denial of Defendant's Marsden Motion*

The information was filed on November 10, 2008 and trial counsel began representing defendant when he was arraigned on that information on November

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *People v. Marsden* (1970) 2 Cal. 3d 118.

[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal. 4th 497.

12, 2008. On January 14, 2009, the trial court ruled on a number of evidentiary motions. Defendant then made a *Marsden* motion.

Defendant told the court, "[T]hese attorneys, they don't understand it's a medical problem with [the victim]. She had a liver transplant. . . . [¶] A lot of what is in here, I had to plead guilty to get out of jail to continue to help her.[4] I have been with her for 12 years. . . . [S]he gets auditory hallucinations when she doesn't take the proper medication. . . . [S]he is now on her proper levels now . . . . [¶] . . . [S]he [had] gone another day on the whole—levels of her anti—the protection medication we would have tried. [¶] . . . [¶] *She's just had a liver transplant* and she must be on all types of medication, and when it isn't there, . . . [¶] . . . [¶] . . . she just completely loses it because she has to have that. [¶] . . . [¶] . . . She isn't all there when she's not taking the medication. And the doctor could prove that when she was having those big problems, she was low on her Gengraf."[5]

When the court asked defendant what this had to do with his relationship with defense counsel, defendant said that counsel was "approaching [the case] from the wrong angle"—that a doctor needed to explain that the victim's medical

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[4] Defendant is obviously referring to his conviction for domestic abuse committed in 2006 or in 2002 or both. However, it is clear that the victim's transplant occurred long after these events, so how a drug she could only have been taking after the transplant (see last paragraph of fn. 10, *post*, p. 7.) was related to these incidents is beyond us.

[5] Appellate counsel for defendant informs us in his opening brief that this is a drug used to prevent the rejection of transplanted organs.

condition caused her to believe things happened that didn't and "[a] lot of this never took place." The court told defendant that perhaps his attorney may be trying to tell him that not all evidence is admissible or that even if this evidence was, it was not likely to change the outcome of the case or it might damage his defense.

At the court's directions, defense counsel outlined his experience as a criminal defense attorney, including the fact that he had worked for the Riverside Public Defender's Office continuously for 11 years and had handled 47 felony trials and numerous misdemeanor trials. Counsel said that he had spoken to the victim both in court and on the telephone about the issue raised by defendant and she had told him that she had, indeed, had a liver transplant, she was dependent on defendant to get her to the doctor and to make sure she takes the proper dosages of her medications, and that she felt it was essential that he be out of custody so he could continue to help her. However, she did not say that she was delusional or that she wanted to recant. Counsel's sense was that the victim was lucid at the time of the crimes and he felt the tape of the 911 call bore this out. He added that there was physical evidence to corroborate what she had said happened.[6] He said

[6] Defendant asserts the physical evidence only corroborated the infliction of corporal injury charge, not the dissuasion of a witness charge. However, the People's theory of the latter at trial was that it occurred when defendant squeezed the victim's arm and told her he would kill her before the police got there. Thus, to the extent this offense included the squeezing of the victim's arm, it was corroborated by the physical evidence. Moreover, there was plenty of corroboration of the threat, at the preliminary hearing, by the victim and the

he had not been informed of the possibility that she was delusional due to her medical problems.[7] He said he had reviewed earlier police reports concerning the crimes and reports of prior domestic violence incidents. He noted that the victim had claimed that she had had no negative physical contact with defendant, yet defendant had twice previously pled guilty to felony domestic violence involving her and counsel was concerned that she would appear untruthful because she would be impeached with evidence of this.

The court asked defendant if there was anything he wanted to add. He said that he wanted to have a doctor testify about the victim's liver "because that had to do with a lot of things that I didn't do . . . ." He reasserted that when the victim does not get the proper dosages of her medication, she gets delusional and he criticized defense counsel for not having an investigator ask her about this.

The court concluded that defense counsel had done "more than adequate preparation" and the court would defer to counsel's judgment. The court pointed

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responding officer and, at trial, by the responding officer and the manager. (See second paragraph of fn. 10, *post*, p. 7 and fn. 11, *post*, p. 8.)

[7] Specifically, he said, "I hasn't been brought to my attention that this was a probability that liver disease could make her so delusional that she had no idea what was going on." Defendant jumps on this statement in his reply brief and asserts that defense counsel had a duty to investigate whether the victim's liver disease caused her to imagine the crimes. In fact, defendant consistently asserted below that it was not liver disease, but the victim's reaction to her anti-rejection medication that caused the problem.

out that prior police reports,[8] the tape of the 911 call,[9] testimony at the preliminary hearing[10] and statements by law enforcement people and neighbors[11] suggest that

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8 Those reports are not part of the record before this court. However, two police officers who responded to prior domestic violence incidents between the victim and defendant testified at trial. The officer who responded to the 2002 incident testified that there were bruises on the right side of the victim's face and redness on her neck. The victim told this officer that these injuries had been inflicted by defendant, who grabbed her around the neck and used his other hand to hit her in the back of the head two or three times, then punched her on the right side of her face. She went to the emergency room. The victim said she did not know if she wanted to press charges because she was afraid of what defendant would do to her. The officer who responded to the 2006 incident testified that the victim was afraid and hysterical and she told him that she had been in an argument with defendant, who was angry at the victim and threw a water bottle at her, hitting her in either the back or the chest. She told defendant she was going to call the police and he said he would rip her throat out before the police got there. When the victim threatened to call defendant's relative and tell him what had happened, defendant ran at her with a clenched fist and hit her in the back of her head. He then told her he would break her jaw if she told anyone about the incident. The following day, she went to a neighbor's apartment and called the police.

9 During the call, the victim said that defendant was on probation for domestic violence, that he had already hurt her, he had taken and probably destroyed her cell phone, he was trained in martial arts, he was headed towards the kitchen to get a knife and he had threatened to kick in the door of the blind manager in whose apartment the victim had sought refuge. Twice during the brief call she told the dispatcher to tell the responding police officers "to be ready for a fight"

10 At the preliminary hearing, the victim's testimony was "all over the place." First, she testified that she called the police on the day of the crimes because defendant had grabbed her arm and had said some things to her and she was scared. She said defendant was still mad from the night before and while she sat in her chair reading a book, he made statements about her daughter, which made her mad. Then she testified that defendant threatened to kill her if she called the police after she threatened to call the police and get him in trouble while he was on probation, but she did not believe his threat. However, she admitted telling the responding officer that defendant's threats scared her, but she passed this off as being due to excitement and the medication she was taking. She said than

defendant walked into the kitchen and she heard a drawer open and assumed he was getting knife, so she went to her manager's apartment, where she called the police. She said she was aware of defendant's prior conviction for domestic violence. During cross-examination, she did not remember throwing a book at defendant before he grabbed her arm. She said defendant grabbed her arm while they were arguing, after she had threatened to call the police. Then she testified that after defendant threatened to kill her, he grabbed her arm. When asked whether the arm grabbing was before defendant threatened to kill her, the victim testified that she was having trouble remembering the order of events, and she ascribed this to the medications she was taking and the fact that she "just had a transplant." Then she testified that she told defendant she was going to call the police, then he threatened to kill her, then he grabbed her arm while she was reaching for *her* cell phone. She testified that she had not missed taking her medication the day of the crimes and she had not taken them since her transplant, implying that the transplant occurred after these crimes. She denied she had been drinking that day. During redirect examination, the victim testified that before she threatened to call the police, defendant had thrown *his* cell phone at the chair in which she was sitting, it had hit the side of the chair and the back had broken off and the battery had dislodged and slid down the side of the chair. She tried to dig the battery out of the chair and defendant approached her and grabbed her arm. When reminded that she had told the responding officer that defendant's cell phone had hit her arm, the victim testified that it had hit her arm, although it did not damage it, and the battery had slid down the side of her chair and she was trying to retrieve it when defendant grabbed her arm. When the prosecutor said, "You were explaining . . . what happened when you went to grab *your* cell phone[,]" the victim again claimed to be having difficulties with her memory, but reiterated that defendant grabbed her arm when she was trying to retrieve the battery for *his* cell phone. She denied telling the responding officer that defendant had told her to say that she was the one who started the physical confrontation so he would not have to go to jail. She denied receiving a call from defendant while he was at the hospital.

The responding officer testified at the preliminary hearing that the victim was visibly shaken and trembling and had swelling and a bruise on her left forearm. The victim told her that defendant said, "'I'll kill your fucking ass. I'll kill you before the cops get here. I'll kill your fucking ass'" after she told him she was going to call the police. The officer resported that the victim told him that after a brief struggle, defendant went into the kitchen and the victim heard a drawer open and believed defendant was getting a knife, which made her very afraid. She then left the apartment. The officer testified that the victim had not told the officer that defendant had said he would kill her *if* she called the police.

Finally, the victim was "all over the place" as to when she got her liver transplant and when she was on anti-rejection medication. As stated before, she

testified at the preliminary hearing (October 29, 2008) that she had just gotten the transplant, although she also testified that she had not failed to take her medication the day of the crimes, and, conversely, that she did not take medications after her transplant. Also, as already stared, defendant said at the *Marsden* hearing (January 14, 2009) that the victim had just gotten her transplant. (See text, p. 3.) The victim had said during her 911 call on September 14, 2008 that she was "a recovering liver transplant patient" (Exhibit 10A) and she told the probation officer after trial that she had had a liver transplant on October 29, 2007. However, at trial, she testified that in 2006, she was not "on her liver medication," which she described as anti-rejection medication, but she had a transplant. She also testified at trial that she was not on any liver medication in 2002.

11 Discovery documents for law enforcement officers and the victim's apartment manager, a neighbor, are not part of the record before this court. However, we do have their trial testimony. The victim's apartment manager testified that on the day of the crimes, the victim came down to her apartment, upset and crying, and said that defendant was out of control and she was going to have to call the police. The victim used her cell phone to call defendant, then she went upstairs, during which time the manager heard a thump coming from the apartment shared by the victim and defendant. The victim soon returned to the manager's apartment, this time hysterical, and said that defendant had hit her. The victim told the manager that defendant had threatened to kill her.

The officer who responded to the scene testified that the victim's arm was bruised, red and swollen. The victim said that defendant had grabbed her, she was very scared and she wanted him arrested. She also said that he had threatened to kill her and she warned the officer to be careful as defendant was very dangerous. The officer testified that the victim did not appear confused and she was completely lucid. Later, the victim elaborated on the incident, saying it began with a disagreement over whether her family was allowed to visit at the apartment. Specifically, referring to the victim's daughter, defendant had said to the victim, "'Your little fucking cunt can't come over again.'" Defendant also said, "'Your fat, pig niece will never step through this door. In fact, none of your family will ever, ever come through that door again.'" When she told him it was her home, too, he threw the cell phone at her, and it struck her near her left elbow. The victim then told defendant that she was going to call his probation officer. Defendant asked the victim if she was threatening him and he grabbed her arm with great force. While holding on to it, defendant said, "'I'll fucking kill you. I will fucking kill your ass before the cops get here.'" She became very frightened, so she tried to convince him that she would not call his probation officer. After she pulled away from him, he went into the kitchen and she was afraid he was going to get a knife so she went to her manager's apartment. As she arrived at the manager's door, defendant came out onto the landing above it and told her not to

the charged crimes had been committed. The court said that it was impressed by the fact that defense counsel had spoken directly to the victim and had correctly made an assessment about the likelihood of success of exploring her medical condition. The court concluded that there had been no breakdown in the attorney/client relationship—only that there was a difference of opinion as to strategy, but the court "balance[d] that off with [defense counsel's] experience, his reputation, and the [c]ourt's own knowledge of [him], in addition to what he's stated here in court." The court denied the motion.

Defendant criticizes the assessment of defense counsel below that the victim was not delusional at the time of the crimes. He asserts that it was based on counsel's conversations with the victim at a time when, due to her taking the proper dosage of her anti-rejection drug, she was not delusional. However, defendant misreads the record. Counsel below said that his assessment of the victim was based on the fact that at the time of the motion, when she was, according to defendant, fully lucid, she was not claiming that she was delusional at the time of the crimes, and that the tape of the 911 call, the report of the

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go inside, that he would kick the door in. The victim said that defendant had a black belt in martial arts and she wanted him arrested. She said defendant had been violent with her before and was on probation for it, but she had asked that he be treated leniently in that case because she felt he was "following through on his Christian faith." The victim did not tell the officer that she had threatened to or had thrown the book she was reading at the time the argument started at defendant. This officer's preliminary hearing testimony is summarized in footnote 10, *ante*, page 6.

responding officer and some physical evidence supported that. All of this is true.[12] Additionally, the prior domestic violence incidents supported it.[13] The victim's effort to absolve defendant of guilt for this and the prior offenses by asserting, in writing, that defendant had never physically abused her, as defense counsel pointed out, would have been used by the prosecutor to seriously undermine any claim by her doctor that she was delusional on the day of the crimes. For all those reasons, along with the fact that the victim had a habit of being abused by defendant, then continuing a relationship with him and how poor a witness she proved to be at the preliminary hearing,[14] we can, like the trial court, well understand the reluctance of counsel below to further explore this "defense." Had defense counsel presented this "defense" he would have had to have overcome the victim's testimony at the preliminary hearing that she was taking her medication at the time of the crimes, but she had been off it since her transplant, which she said during her 911 call on September 14, 2008 had already occurred. Moreover, there can be no doubt whatsoever that despite defendant's claim that the victim's failure to take the proper dosage of this drug meant that he was factually not guilty of the 2002 and 2006 prior domestic violence offenses, to

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[12] See footnotes 9, 10, and 11, *ante*, pages 6-9.

[13] See footnote 8, *ante*, page 5.

[14] See footnote 10, *ante*, page 6.

which he had pled guilty, this drug could not possibly have been involved, as both defendant and the victim conceded that her transplant occurred long after both crimes.[15] Therefore, even if defense counsel could have gotten a doctor to testify that the victim was delusional on September 14, 2008, because of her failure to take the proper dosage of the anti-rejection drug, defendant would still be faced with the fact that he had previously abused the victim on two other occasions, and during one, in particular, his actions and statements are almost identical to what occurred this time.[16] Both defense counsel in his explanation for not exploring this "defense" and the trial court in its ruling referred to this fact. As the People correctly point out, a defendant bears a heavy burden when making a *Marsden* motion (*People v. Bills* (1995) 38 Cal.App.4th 953, 961), and defendant came nowhere close to bearing that burden here. Certainly the testimony at trial bore out counsel's decision not to pursue this "defense."[17] As the trial court correctly

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[15] See the last paragraph of footnote 10, *ante*, page 7.

[16] See footnote 8, *ante*, page 5, the second paragraph of footnote 10, *ante*, page 7, and the second paragraph of footnote 11, *ante*, page 8.

[17] See footnotes 8, 9, and 11. We are particularly impressed, as we are certain the jury was, with the eerie similarities between this incident and the 2006 domestic violence incident. In the present case, defendant threatened to kill the victim before the police arrived; in the earlier one, defendant threatened to rip the victim's throat out before the police arrived. (See fn. 8, *ante*, p. 5, the second paragraph of fn. 10, *ante*, p. 7, and the second paragraph of fn. 11, *ante*, p. 8.)

Although we assess the trial court's denial based on the facts as they existed at the time it was made, we reference the evidence at trial only to demonstrate that the defense counsel's rejection of this strategy ultimately proved to be correct.

observed, this was not a failure to investigate, but a clash of wills over trial strategy, for which counsel is, without doubt, the "captain of the ship." (*People v. Jackson* (2009) 45 Cal.4th 662, 688 ["'Tactical disagreements between the defendant and his attorney do not by themselves constitute an "irreconcilable conflict." " . . . [C]ounsel is 'captain of the ship' and can make all but a few fundamental decisions for defendant." [Citation.]' [Citation.]"].) It did not amount to a breakdown in the attorney/client relationship requiring substitution of counsel. (*Ibid.*) Therefore, there was no abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1190.)

2. *Denial of Romero Motion*

The trial court denied defendant's motion to dismiss his strike, saying, "[I]f I were to [dismiss] the strike, it would be far worse for the [victim]. . . . [¶] . . . The defendant was on probation for [making original threats]. It's a serious felony. . . . The [c]ourt also considered the relationship in terms of time between the time . . . when the prior offenses were committed and the current offense. [¶] . . . [The victim's injuries] were not as significant as one sees in other cases involving domestic violence. [¶] The [c]ourt also considered the language that the defendant [used], 'I will kill your fucking ass. I'll kill you before the cops get here.' The [c]ourt considers that and views that as serious and knows the frequency of the defendant's criminal activity."

As an aside, it is interesting that in the context of defendant's *Romero* motion, the "defense" defendant sought to have forced on his trial counsel, as already discussed, was abandoned in favor of a completely different "defense"—this time, involving *his* medical condition and drug regimen.[18]

Defendant contends that the trial court abused its discretion in denying his *Romero* motion. He states, "Based on the relatively minor injury inflicted in this case, the nature of [defendant's] prior serious felony conviction, and for the reasons capably stated by counsel in is motion and during the sentencing hearing, the court abused its discretion . . . ."

First, we do not address matters that are not specifically addressed in the briefs. If defendant wants us to address each point made by counsel below in both his written *Romero* motion and his arguments at the hearing on the motion, as well as his arguments at sentencing, he needs to bring each to our attention and demonstrate how they show that the trial court abused its discretion. Our job is not to address issues incorporated by reference, with no further development by appellate counsel.

As to the two specific points defendant makes in his briefs, we now address the first. The trial court credited defendant with the fact that he inflicted slight

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[18] The victim told the court that defendant was bipolar and "a few years back, he went . . . toxic on the Lithium he was taking because he also has liver disorder, and he stopped taking bipolar medication, . . . and that's . . . why things happened. . . . [S]ince he's been in jail, he's been on the medication and it really seems like it's working."

injury on the victim during this particular episode of domestic violence. However, it balanced that against the threat to the victim's life defendant made, which, as we have already noted, mirrored the threat he made to her in 2006,[19] for which he suffered the strike conviction. The court also balanced it against the fact that his prior convictions for abusing the victim were not particularly remote and were reoccurring.

As to the nature of defendant's prior convictions, we note that he speaks of them as though they constitute one offense when, in fact, they constitute two on two occasions years apart. As we have already stated, defendant was convicted of domestic violence involving the victim both in 2002 and 2007. The 2007 conviction, based on a 2006 incident, was sufficiently "serious" to render defendant a one-striker. He was still on probation for this offense when he committed the instant crimes. Additionally, defendant had committed a felony and several misdemeanors before he committed these acts of domestic violence. Apparently, defendant learned little from the lenient punishment, i.e., (probation) he received for both prior domestic violence offenses. During this incident, defendant not only threatened the victim, but threatened to break down the blind manager's apartment door. Additionally, after it was over, he twice attempted to persuade the victim to lie so he could escape the consequences of his actions. Even after his convictions, defendant denied hitting the victim and he claimed the

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[19] See footnote 8, *ante*, page 5.

case had been "blown out of proportion." Despite everything that had happened, both defendant and the victim planned to continue their relationship. With defendant so lacking insight into his behavior, as the trial court pointed out, a shorter sentence, as a consequence of the dismissal of the strike, would be disastrous for the victim. The facts here were not the extraordinary circumstances for which dismissal of a strike is reserved. (See *People v. Philpot* (2004) 122 Cal.App.4th 893, 906 [Fourth Dist., Div. Two].) There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

MILLER
J.